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CTEB & ANOR v. KETUA PENGARAH PENDAFTARAN NEGARA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[ORIGINATING SUMMONS NO: WA-24NCVC-1858-11-2016]
B 23 AUGUST 2017

CONSTITUTIONAL LAW: *Citizenship – Application – Illegitimate child – Biological mother of child a non-citizen of Federation of Malaysia – Whether 'father' under s. 17 of Part III of Federal Constitution ('FC') refers to mother – Whether mother's non-citizenship an impediment to application – Whether subsequent marriage of parents altered illegitimacy of child for purposes of art. 14(1)(b) of FC – Whether child lacked requisite qualification to acquire citizenship 'by operation of law'*

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The first plaintiff ('P1') was born in the Philippines on 27 September 2010. His biological father, the second plaintiff ('P2') is a Malaysian whilst P1's mother ('Maylene') is a citizen of the Republic of Philippines. At the time of P1's birth, P2 and Maylene were not married and hence, P1 was illegitimate at the material time of his birth. P2 and Maylene legally registered their marriage in Malaysia on 22 February 2011, five months after P1 was born. On 20 April 2011, an application for citizenship was made on behalf of P1 pursuant to art. 15A of the Federal Constitution ('FC'), but the application was rejected. Hence, the application herein, for a declaration that P1 is a citizen of the Federation of Malaysia 'by operation of law'. The reliefs sought by the plaintiffs in this application were: (i) a declaration that P1 was a Malaysian citizen under art. 14(1)(b) and/or art. 15(2) of the FC; (ii) and order compelling the defendants to issue a certificate of citizenship and a Malaysian identity card to P1; (iii) an order for the defendants to register P1's name in the Register under s. 4 of the National Registration Act 1959 and its Regulations; and (iv) damages.

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G **Held (dismissing application with no order as to costs):**

(1) Citizenship by 'operation of law' is governed by art. 14(1)(b) of the FC with s. 1 Part II and s. 17 Part III of the Second Schedule of the FC. Section 1 Part II of the Second Schedule of the FC is subject to the provisions of Part III of the Second Schedule. Section 17 has specifically and unambiguously construed that 'father' for the purposes of Part III of the FC which governs the acquisition of citizenship, in relation to a person who is illegitimate, refers to his mother. At the material time of his birth, P1's mother was not a citizen of the Federation of Malaysia and hence, P1 clearly did not fulfil the criteria which is necessary for the application of art. 14(1)(b) of the FC. (paras 48-50)

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(2) Upon the marriage of P2 with Maylene, P1 was no longer illegitimate pursuant to s. 4 of the Legitimacy Act 1961 ('Legitimacy Act') and pursuant to s. 9 of the Legitimacy Act, P1 acquired all the rights and entitlements as a legitimate child of his parents 'as if he had been born legitimate'. However, the section referred to only 'maintenance and support' claim and for 'damages, compensation, allowance, benefit or otherwise' under any written law. The section does not expressly or impliedly allude to acquisition of citizenship by a child whose illegitimate status has been legitimised by virtue of the subsequent marriage of his parents. (paras 51 & 52)

(3) The FC is to be construed on its own and without regard to the provisions of other statutes, such as the Adoption Act 1952 and by parity of reasoning, the Legitimacy Act. Therefore, although P1 has become legitimate for the purpose beyond the four corners of s. 9, that, of itself did not mean that P1's status of illegitimacy had been altered for purposes of art. 14(1)(b) and s. 1 Part II of the Second Schedule to the FC. His illegitimate status at the point of birth remained extant and s. 17 Part III to the Second Schedule to the FC applied with full force. Therefore, the legitimisation of P1's status with effect from the date of his parents' marriage was irrelevant as far as s. 17 Part III of the Second Schedule of the FC is concerned. P1 thus lacked the requisite qualification for purposes of acquiring citizenship 'by operation of law' under art. 14(1)(b) of the FC. (paras 56, 57, 66, 68 & 69)

(4) Based on s. 17 Part III of the Second Schedule of the FC, the parent of an illegitimate child whose biological mother is a non-citizen, is disqualified from making an application for citizenship under art. 15(2) of the FC. Hence, P1's biological mother's non-citizenship was an impediment to any application for citizenship under art. 15(2) of the FC. In the circumstances, the prayer for an order that P1 be issued with a certificate of citizenship did not arise. (paras 72, 73 & 75)

Case(s) referred to:

Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd [2016] 7 CLJ 19 CA ***(refd)***

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2016] 1 CLJ 736 HC ***(refd)***

Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia [2012] 4 CLJ 613 HC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 HC ***(refd)***

Nedunchelian V Uthiradam v. Nurshafizah Mah Singai Annal & Ors [2005] 2 CLJ 306 HC ***(refd)***

Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor [2017] 7 CLJ 33 CA ***(foll)***

Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor [2004] 2 CLJ 416 HC ***(refd)***

Yu Sheng Meng (Suing Through Next Of Kin, Yu Meng Queng) v. Ketua Pengarah Pendaftaran Negara & Ors [2016] 1 CLJ 336 HC ***(foll)***

Legislation referred to:
Births and Deaths Registration Act 1957, s. 13
Federal Constitution, arts. 14(1)(b), 15(2), 15A, 18, Second Schedule Part II s. 1(b), Part III ss. 2, 17
Interpretations Acts 1948 and 1967, s. 17A
Legitimacy Act 1961, ss. 3, 4, 9
National Registration Act 1959, s. 4

Other source(s) referred to:
Black's Law Dictionary Abridged, 6th edn, Centennial edn 1891-1991

For the plaintiffs - Francis Pereira & Sharmini Thiruchelvam; M/s Francis Pereira & Shan
For the defendant - Mazlifa Ayob; SFC

Reported by S Barathi

JUDGMENT

S Nantha Balan J:

Introduction

[1] The issue in this originating summons ("OS") which was filed on 11 November 2016 is whether the first plaintiff (an infant) ("P1") is entitled to a declaration of Malaysian citizenship pursuant to art. 14(1)(b) or under art. 15(2) of the Federal Constitution of Malaysia. P1 was born out of wedlock and his biological father was a Malaysian at the time of his birth. His biological mother was a non-citizen at the material time of his birth. P1 parents subsequently legitimised their relationship by way of a civil marriage pursuant to the Law Reform (Marriage and Divorce) Act 1976. The primary question is whether P1 is a citizen of the Federation of Malaysia, by "operation of law".

[2] These are my grounds of judgment in respect of an application by the plaintiffs for a declaration that P1 is a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution of Malaysia and under art. 15(2) of the Federal Constitution of Malaysia.

The Facts

[3] P1 was born in the Philippines on 27 September 2010. P1's biological father is Mr Chan Wah Boon, who is the second plaintiff ("P2"). P1's biological mother is Mdm Maylene Venecio Bermillo ("Maylene"). She is a citizen of the Republic of the Philippines. At the time of P1's birth, P2 and Maylene were not married in Malaysia. They were also not married according to the laws of the Philippines. Hence, P1 was born out of wedlock and was illegitimate at the material time of his birth. P2 was born in Alor Setar, Kedah on 13 March 1965 and is a Malaysian citizen by operation of law. P2 and Maylene legally registered their marriage in Malaysia on 22 February 2011 which is about five months after P1 was born. All parties are domiciled in Malaysia.

The Problem

[4] On 20 April 2011, an application for citizenship was made on behalf of P1, pursuant to art. 15A of the Federal Constitution of Malaysia.

[5] Article 15A of the Federal Constitution provides that, "subject to art. 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen". However, P1's application for citizenship was rejected.

[6] Pursuant to the OS, P1 seeks a declaration that he is a citizen of the Federation of Malaysia "by operation of law". The issue at hand revolves around the interpretation of the relevant provisions of the Federal Constitution of Malaysia dealing with citizenship. I turn now to the OS. Under the OS, the plaintiffs seek the following reliefs:

(i) a declaration that P1 is a Malaysian citizen under art. 14(1)(b) and/or art. 15(2);

(ii) an order compelling the defendants to issue a certificate of citizenship and a Malaysian identity card to P1;

(iii) an order for the defendants to register P1's name in the Register under s. 4 of the National Registration Act 1959 and its Regulation; and

(iv) damages.

Acquisition Of Citizenship

[7] It is common ground that the acquisition of citizenship by operation of law is governed by art. 14 read together with Part II of the Second Schedule of the Federal Constitution. In the present case, art. 14(1)(b) is relevant and it reads as follows:

> **Citizenship by operation of law**
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> 14 (1) Subject to the provisions of this Part, **the following persons are citizens by operation of law**, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and
>
> (b) **every person born** on or **after Malaysia Day**, **and having any of the qualifications specified** in **Part II** of the Second Schedule.
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> (emphasis added)

[8] The necessary qualifications are as stipulated in Part II of the Second Schedule and the relevant portion of Part II of the Second Schedule of the Federal Constitution provides as follows:

> 1. **Subject to the provisions of Part III** of this Constitution, the following persons born on or after Malaysia Day **are citizens by operation of law**, that is to say:

A (b) **every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation** or is at the time of the birth in the service of the Federation or of a State; and

(emphasis added)

B **[9]** Section 1 Part II of the Second Schedule of the Federal Constitution is subject to the provisions of part. III of the Second Schedule. In particular, s. 17 is relevant and reads as follows:

Section 17 - For the purposes of Part III of this Constitution, **reference to a person's father or to his parent, or to one of his parents, are in** C **relation to a person who is illegitimate to be construed as references to his mother**, and accordingly section 19 of this Schedule shall not apply to such a person.

(emphasis added)

D **Plaintiffs' Submission**

[10] It was submitted for the plaintiffs' that upon a proper interpretation, these articles of the Federal Constitution of Malaysia constitutionally guarantee P1's right to Malaysian citizenship. Counsel said that the relevant articles of the Federal Constitution of Malaysia need to be carefully E considered and interpreted accordingly. To this end, reference was made to *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 wherein the Federal Court held as follows:

At p. 639:

F [8] ..., the Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a G prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution.

At page 642 - [13] ... Whilst **fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively**.

H (emphasis added)

[11] As such, it was argued that whilst art. 14(1)(b) and s. 1(b) Part II of the Second Schedule should be interpreted generously, s. 17 Part III of the Second Schedule and its application should be given a restrictive approach. The next legislation that was referred to was the Legitimacy Act 1961. It will I be recalled that P2 and Maylene were married in Malaysia on 22 February

2011. According to counsel, P1 became legitimised and his status therefore changed "retrospectively" for purposes of art. 14(1)(b), s. 1(b) Part II of the Second Schedule and s. 17, Part III of the Second Schedule. I turn now to the Legitimacy Act 1961.

The Legitimacy Act 1961

[12] Based on the civil marriage between P2 and Maylene on 22 February 2011, it was argued for P1 that the marriage between the biological parents of P1, which was duly registered in Malaysia, "legitimised" his status and thus for all intents and purposes he cannot and should not be termed "illegitimate". Reference was made to ss. 3, 4 and 9 of the Legitimacy Act 1961, which read as:

Section 3 of the Legitimacy Act 1961:

> 3. Conditions of application of Act
>
> (1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnised and registered in accordance with ...

Section 4 of the Legitimacy Act 1961:

> 4. Legitimation by subsequent marriage of parents
>
> Subject to section 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever is the later.

Section 9 of the Legitimacy Act 1961:

> 9. Personal rights and obligations of legitimated persons
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> A legitimate person shall have the same rights and be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and subject to this Act the provisions of any written law relating to claims for damages, compensation, allowance, benefit or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

[13] Counsel for P1 also referred to and sought to distinguish the decision of the High Court in *Yu Sheng Meng (suing through next of kin, Yu Meng Queng) v. Ketua Pengarah Pendaftaran Negara & Ors* [2016] 1 CLJ 336; [2015] MLJU 637 where there was no evidence of a marriage between the biological parents of the child in question. Counsel referred to p. 346 of the judgment where the High Court held that:

A (viii) as the Plaintiff had not made any averment pertaining to the status of his parent's marriage and/or provided evidence that both his biological parents had been legally married and or provided evidence that the provision of s. 3 of the Act 60 had been satisfied, the plaintiff is deemed to be an illegitimate person under the law.

B and to p. 347 where the court held:

(xi) it is apparent from the facts that were presented there is no evidence of valid marriage and or a solemnisation having taken place between the plaintiff's parents under any recognised law, the plaintiff therefore had obviously not satisfied the requirement under the relevant laws that I had
C discussed above to be qualified as a citizen of Malaysia by operation of law.

[14] Consequently, it was submitted for the plaintiffs that in the present case:

(i) The proper solemnisation and registration of marriage between P2 and
D Maylene evidences that the condition in s. 3 of Legitimacy Act 1961 has been satisfied;

(ii) Section 4 of Legitimacy Act 1961 renders P1 legitimated since his biological parents subsequently married;

E (iii) P1 is not illegitimate and references to a person's father or parent in s. 17 Part III of the Second Schedule Federal Constitution are not to be construed as a reference to his Filipino mother (Maylene);

(iv) P2 is the father as referred to in s. 1(b) of Part II of the Second Schedule of the Federal Constitution; and

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(v) Accordingly, s. 17 of Part III of the Second Schedule does not apply.

[15] Counsel for the plaintiffs argued that when interpreting the Legitimacy Act 1961, a purposive approach as per s. 17A of the Interpretation Acts 1948 and 1967 should be followed:

G In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[16] Counsel also implored upon this court to have regard to the decision
H of the Court of Appeal in *Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd* [2016] 7 CLJ 19 where it was held at p. 28:

In addition, Lord Denning had often reminded us that judicial decision must not be confined to law but also common sense which we these days called as purposive approach and is partly codified. (See s. 17A of the
I Interpretation Acts). At times, without the application of common sense, a just result cannot be achieved.

[17] Further, counsel referred to the approach to interpretation that was taken by this court in *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd* [2015] 6 CLJ 788 where it was held that:

> [85] In my view, the interpretative process in the present circumstance cannot exclude an examination of the purpose and intent of the statutory provision. Indeed, there seems to be authority to support the purposive approach even in the absence of any ambiguity or conflict of meaning in the words appearing in a statutory provision.

[18] Counsel also urged this court to recognise P1 as a legitimated person and accord him the same rights, obligations and benefits as a legitimate child, which includes a Malaysian citizenship.

Best Interest Of The Child

[19] It was also submitted for P1, that the court should take into account the fact that Malaysia had ratified the United Nation Convention on the Rights of the Child ("CRC") in 1995 to uphold Malaysia's commitment to the protection and welfare of the children in the country. Counsel referred to art. 3 of the CRC which states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.

The Child-Focused Approach

[20] In this regard, counsel for P1 urged that a "child-focused approach" should be taken when coming to a decision in this matter. Counsel said that the ultimate goal when deciding what is in the best interest of P1 is to ensure his happiness, security, mental and physical health. He said P1's emotional development is equally important.

[21] Counsel asked that the following facts be taken into consideration. He said that P1 is currently enrolled in Standard One at SJK (C) Yuk Chai, Taman Megah, Petaling Jaya, Selangor.

[22] However, the process of enrolling in a Government school as a foreigner has proved tedious. The process of enrolment of a non-citizen child apparently leaves P1 at the mercy of many officials and includes but is not limited to, officials involved in the approval of applications from the State Education Department. He said payments have to be made to the District Education Department. He said the student visa has to be procured periodically from the Immigration Department. According to counsel, the process and procedure as described above is burdensome and circuitous and points towards the ambivalent attitude of the present law regarding legitimacy of children and their citizenship. It clearly penalises the children, who are themselves innocent pawns.

[23] According to counsel, the provisions of the Federal Constitution as outlined above clearly indicate that P1 has a right to acquire citizenship by operation of law, even though he was born outside the Federation of Malaysia ie, the Philippines, since at the time of his birth, his father, P2 was a Malaysian citizen. In amplification, counsel said that under Malaysian law, a child who was born before the marriage of its parents, is legitimated when that marriage is celebrated thereafter (*legitimation per subsequences matrimonium*).

[24] Counsel argued that the legitimatisation of the marriage of P1's biological parents removes the barrier to citizenship as per s. 17 Part III of the Second Schedule. In any event, it was submitted that the distinction between legitimate and illegitimate children is legally discriminatory and causes irreparable emotional and psychological harm in placing the child in an inferior position. The Legitimacy Act 1961 should not be read in isolation, but in harmony with the relevant provisions of the Federal Constitution to encapsulate the overall intention in enacting the Legitimacy Act 1961. It was contended that to do so otherwise would defeat the purpose and intent of the Legitimacy Act 1961.

[25] Thus, counsel summarised his position by stating that the preconditions contained in art. 14(1)(b) and s. 1(b) Part II of the Second Schedule of Federal Constitution have been fulfilled:

(i) "every person born outside the Federation" - P1 was born in the Philippines; and

(ii) "whose father is at the time of the birth a citizen" - P2 (P1's father) was a citizen Malaysia at the time when P1 was born.

[26] Counsel for P1 frankly accepted that the only issue in dispute was with regard to s. 17, Part III of the Second Schedule to the Federal Constitution which states:

> For the purposes of Part III of this Constitution, reference to a person father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.

[27] Counsel said that the words in s. 17, Part III of the Second Schedule should be given a plain and literal meaning. Hence, it was argued that the words "in relation to a person who is illegitimate" can only be construed to mean that the person must be legitimate at the point of making the application for citizenship pursuant art. 14(1)(b) and s. 1(b) Part II of the Second Schedule. On that analysis, counsel argued that at the point of making the application by way of the OS, P1 was not illegitimate. He had been legitimated by the subsequent marriage of his parents (see: s. 4 Legitimacy Act 1961). Further, it was argued that s. 17 Part III of the Second Schedule of the Federal Constitution is worded in the present tense. As such, the point of legitimation, as per s. 4 of the Legitimacy Act 1961 is from the date of

marriage, that is, 22 February 2011. In conclusion, it was submitted that the orders that the plaintiffs are seeking from this honourable court are reasonable and necessary to give effect to the spirit and intent of the Federal Constitution with regards to citizenship as contained in art. 14(1)(b) and s. 1(b) Part II of the Second Schedule.

[28] I turn now to the counter-arguments that were made by the learned Senior Federal Counsel ("the learned SFC") on behalf of the respondents.

Defendants' Arguments

[29] On behalf of the defendants, the learned SFC advanced the following arguments to oppose the application:

(i) P1 is not qualified to acquire citizenship by operation of law under art. 14(1)(b); and

(ii) P1 is not eligible to acquire citizenship by registration under art. 15(2).

P1 Is Not Qualified To Acquire Citizenship By Operation Of Law

[30] According to the learned SFC, P1 is not entitled to acquire citizenship of Malaysia by way of operation of law because he did not fulfil the requirements of art. 14(1)(b) of Federal Constitution read together with s. 1(b) Part II of the Second Schedule. She said, in order to acquire citizenship by operation of law under art. 14(1)(b) read together with s. 1(b) Part II of the Second Schedule, the following conjunctive requirements must be fulfilled:

(i) The child must be born on or after Merdeka Day;

(ii) The child must be born outside the Federation of Malaysia;

(iii) At the time of birth, the father of the child must be a citizen; and

(iv) The birth must be registered within one year at a Consulate of the Federation or with the Federal Government.

[31] Continuing with her submission, the learned SFC said that being a biological father to the child at the time of birth *per se*, is insufficient for the child to acquire citizenship under art. 14(1)(b) read together with s. 1(b) Part II of the Second Schedule because s. 17 Part III of the Second Schedule has specifically construed that "father" for the purpose of Part III of the Federal Constitution which deals with citizenship, in relation to a person who is illegitimate, refers to his mother. It is worth recalling that s. 17 stipulates:

> For the purpose of Part III of this Constitution **references to a person's father or to his parent, or to one of his parents**, are **in relation to a person who is illegitimate to be construed as references to his mother**, and accordingly section 19 of this Schedule shall not apply to such a person.
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> (emphasis added)

[32] In this case, at the time of P1's birth, P2 and Maylene were not validly married under the Malaysian law, thus, rendering P1's status at the time of his birth as illegitimate in the eyes of Malaysian law. Hence, the learned SFC submitted that by virtue of s. 17 Part III of the Second Schedule, "father" in respect of the illegitimate child, refers to his mother who is a non-citizen, and thereby rendering P1 as a non-citizen, as he follows his mother's citizenship status.

[33] The learned SFC said that while it is true that an illegitimate child may be legitimised through a solemnised and registered marriage as provided under s. 3 of the Legitimacy Act 1961, the subsequent marriage does not change the birth status of the child for purposes of the Federal Constitution of Malaysia.

[34] It was contended by the SFC that even under s. 4 of the Legitimacy Act 1961, the subsequent marriage of the parents will only render the child as legitimate from the date of the marriage. Hence, the subsequent marriage of P2 and Maylene under the Law Reform (Marriage and Divorce) Act 1976 on 22 February 2011, does not have the effect of altering P1's birth status.

[35] According to the learned SFC, the illegitimate status of P1 at the time of his birth remains extant. In this circumstances, his birth status does not qualify him to be a citizen by operation of law.

[36] It was argued that the emphasis of the requirement under art. 14(1)(b) has to be placed on a person's birth status because it clearly refers to the fulfilment of the requisite conditions at the time of a person's birth. Thus, it was argued that P1's birth status does not qualify him to be a citizen by operation of law. Learned SFC made reference to the case of *Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia* [2012] 4 CLJ 613: [2012] 9 MLJ 573 where Her Ladyship Rohana Yusof J (as she then was), held that an illegitimate child to a non-citizen mother is not qualified to acquire citizenship by operation of law. In that case, the court held at p. 619 (CLJ) as follows:

> [18] ... There is no doubt that at the time of his birth Foo Shi Wen was not born to a lawful parent. Since at birth he was not born to a lawful parent he did not qualify to be a citizen by operation of law. The emphasis of the requirement under art. 14 has to be placed on his birth status because art. 14 clearly refer to the fulfilment of the requisite conditions at the time of his birth. It cannot be disputed that **his birth status does not qualify him to be a citizen by operation of law**. Furthermore s. 17 of the Part III of the Second Schedule provides that "for the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother ..." Thus, it is clear that in a case of an illegitimate child, as in this case, the word parent refers to his mother and not the biological father, the applicant.
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> (emphasis added)

[37] The same approach was adopted by Collin Sequerah JC (as he then was) in the case of *Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2016] 1 CLJ 736 where it was held as follows:

> [103] ... as earlier alluded to, **given the wording contained in Art. 14, the reference to the relationship of the child to the parents is to be determined with relation to the time of birth of the child**.
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> (emphasis added)

[38] According to the learned SFC, *Chin Kooi Nah*'s case was affirmed by the Court of Appeal on 29 March 2016.

[39] According to the learned SFC, the acquisition of citizenship by operation of law under art. 14(1)(b) is subject to the qualifications specified in Part II of the Second Schedule. And a further restriction is in place for an illegitimate child in s. 17 Part III of the Second Schedule which has expressly and unambiguously made a distinction, that in respect of an illegitimate child, reference to a his "parent" or "father" in s. (1)(b) Part II of the Second Schedule is construed as a reference to his "mother".

[40] Thus, under art. 14(1)(b) read with s. 1(b) Part II of the Second Schedule and applying s. 17 Part III of the Second Schedule, the "mother" (*in lieu* of the "father") is a citizen of the Republic of Philippines and P1 is accordingly not qualified to acquire the citizenship of his biological father, by operation of law. Thus, the learned SFC contended that on this premise alone, the application must fail as P1 is not entitled to attain Malaysian citizenship by the very fact that the Federal Constitution does not permit an illegitimate child born to a non-citizen mother to gain citizenship of this country, by operation of law.

[41] The SFC argued that P1 did not satisfy the requirement of art. 14(1)(b) read together with s. 1(b) Part II of the Second Schedule in order to be conferred with the status of citizenship by operation of law. The SFC pointed out that in this respect, there is no room for exercise of discretion either by the Government or by courts.

P1 Is Not Eligible To Acquire Citizenship By Registration Under art. 15(2) Of The Federal Constitution

[42] As for the prayer in the OS by which P1 seeks a declaration of citizenship based on art. 15(2) of the Federal Constitution, the learned SFC pointed out that there was no application for citizenship by registration that was made by the parents of P1 to the Federal Government under art. 15(2) of the Federal Constitution.

[43] She said, unlike citizenship by operation of law, citizenship by way of registration must be applied and approval is subject to the Federal Government's discretion. In this case, there was no such application, rendering this application as premature. In any event, P1 is still not eligible to acquire citizenship under art. 15(2) due to his illegitimate status at the time of his birth. Article 15(2) reads as:

> Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.

[44] Under art. 15(2) of the Federal Constitution, the Federal Government may upon an application made by parent or guardian register a person under the age of 21 years as a citizen if one of the parents is a citizen. The learned SFC contended that since s. 17 Part III of the Second Schedule has made an express distinction for parents or father of an illegitimate child, thus it is only logical that the word "parents" in the context of Part III of the Constitution must be construed to refer to lawful parents in a recognised marriage in the Federation of Malaysia. It was argued for the defendants that parents means father and mother as defined in the case of *Nedunchelian V Uthiradam v. Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 at p. 314:

> Though under art. 160(1) the singular includes the plural nevertheless the placement of the word parent in the singular clearly gives rise as to whether it was intentionally inserted as such to be read in the singular. Interestingly enough art. 160B expressly states that the authoritative text of the Constitution is the Bahasa text and hence when the equivalent term of parent which is "ibu bapa" in the Bahasa text is construed it invariably is interpreted in the singular sense as the plural sense would be kedua ibu bapa in the Bahasa text. That being the case the intention of the framers of the Constitution in placing the word parent in the singular clearly intended it to be such

[45] The learned SFC also referred to the case of *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416 where the High Court had quoted the definition of "parent" from *Black's Law Dictionary Abridged*, 6th edn (Centennial edn 1891-1991) to mean "the lawful father or mother of a person".

[46] According to the learned SFC, lawful parent refers to the biological father and mother in a valid marriage and this is fortified by s. 13 of the Births and Deaths Registration Act 1957 which states as follows:

> 13. Provisions as to father of illegitimate child.
>
> Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the

Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[47] The learned SFC contended that ultimately, eligibility to apply for citizenship by registration under art. 15(2) of the Federal Constitution is circumscribed by s. 17 Part III of the Second Schedule and the child must be born in a lawful wedlock of the parents. Thus, in the present case, P1's illegitimate status at the time of his birth is incapable of being altered despite the subsequent marriage of the parents. Hence, the qualification under art. 15(2) of the Federal Constitution has not been fulfilled as P1's "parent" is to be substituted with the word "mother", who is not a citizen of Malaysia.

Analysis And Conclusion

[48] The starting point in this discussion is that citizenship by "operation of law" is governed by art. 14(1)(b) of the Federal Constitution read together with s. 1 Part II and s. 17 Part III of the Second Schedule of the Federal Constitution. It is material to note that s. 1 Part II of the Second Schedule of the Constitution is subject to the provisions of Part III of the Second Schedule. The relevant provisions in the Federal Constitution are reproduced herein below:

(a) Article 14(1)(b) of the Federal Constitution reads as:

Citizenship by operation of law

14 (1) Subject to the provisions of this Part, **the following persons are citizens by operation of law**, that is to say:

(a) ...

(b) **every person born** on or after Malaysia Day, **and having any of the qualifications specified** in **Part II** of the Second Schedule.

(emphasis added)

(b) Section 1 of Part II reads as:

1. **Subject to the provisions of Part III** of this Constitution, the following persons born on or after Malaysia Day **are citizens by operation of law** that is to say:

(b) **every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation** or is at the time of the birth in the service of the Federation or of a State; and

(emphasis added)

A (c) Section 17 Part III of the Second Schedule reads as follows:

> **Section 17** - For the purposes of Part III of this Constitution, **reference to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother**, and accordingly section
B 19 of this Schedule shall not apply to such a person.
>
> (emphasis added)

[49] Thus, s. 17 has specifically and unambiguously construed that "father" for the purpose of Part III of the Federal Constitution which governs the acquisition of citizenship, in relation to a person who is illegitimate, refers
C to his mother.

[50] At the material time of his birth, P1's mother was not a citizen of the Federation of Malaysia. On that analysis, P1 clearly does not fulfil the criteria which is necessary for the application of art. 14(1)(b) of the Federal
D Constitution of Malaysia.

[51] I turn now to the legitimisation of P2's marriage to Maylene on 22 February 2011. No doubt, with effect from 22 February 2011, upon the marriage between P2 and Maylene, P1 was no longer illegitimate pursuant to s. 4 of the Legitimacy Act 1961. And pursuant to s. 9 of the Legitimacy
E Act 1961, P1 acquires all the rights and entitlements as a legitimate child of his parents "as if he had been born legitimate". But it is important to bear in mind that the section refers to "maintenance and support" claims and for "damages, compensation, allowance, benefit or otherwise" under any written law.

F **[52]** It is significant that the section does not expressly or impliedly allude to acquisition of citizenship by a child whose illegitimate status has been legitimised by virtue of the subsequent marriage of his parents.

[53] Counsel for the plaintiffs has referred to various sections of the Legitimacy Act 1961, in an effort to repudiate the clear and unambiguous
G words of s. 17 Part III of the Second Schedule of the Federal Constitution which refers to the citizenship status of the mother of an illegitimate child rather than the citizenship status of the father.

[54] It was argued that once an illegitimate child has become legitimate pursuant to the Legitimacy Act 1961, then the illegitimacy at the point of
H birth disappears and that P1 therefore fulfils art. 14(1)(b) and s. 1 Part II of the Federal Constitution, and that s. 17 Part III of the Second Schedule to the Federal Constitution, is inapplicable in the circumstances. According to counsel for the plaintiffs, illegitimacy should be viewed at the point of making the application for citizenship and not at the point of birth. I will take
I all these arguments together.

[55] I must say quite emphatically that I am not convinced that it would be legitimate to deem that by virtue of the legitimisation of P1 pursuant to the subsequent marriage of his parents, P1 was not illegitimate at the time of birth for purposes of art. 14(1)(b) and s. 1(b) Part II of the Second Schedule to the Federal Constitution.

[56] In my view, P1's illegitimate status may have been legitimised by virtue of s. 4 of the Legitimacy Act 1961 for all the purposes as stated in s. 9 of the Legitimacy Act 1961. Indeed, P1 may well have become legitimate for purposes beyond the four corners of s. 9. But, that of itself does not mean that P1's status of illegitimacy has been altered for purposes of art. 14(1)(b) and s. 1 Part 11 of the Second Schedule to the Federal Constitution.

[57] Thus, regardless of the subsequent legitimization of P1's status with effect from 22 February 2011, his illegitimate status at the point of birth remains extant and s. 17 part III to the second schedule to the Federal Constitution applies with full force with the result that the relevant citizenship status is that of the mother and here it is plainly obvious and indisputable that at birth, P1 was illegitimate and his mother was not a citizen of the Federation of Malaysia.

[58] Whilst on this point, it is relevant and pertinent in my view to refer to the case of *Yu Sheng Meng (Suing Through Next of Kin, Yu Meng Queng) v. Ketua Pengarah Pendaftaran Negara Ors* [2016] 1 CLJ 336; [2015] MLJU 637 HC (per Asmabi J - as she then was). In that case, the plaintiff was born in Penang to a Malaysian father and an Indonesian mother on 19 May 2008. On the face of the plaintiff's birth certificate, the birth was registered pursuant to s. 13 of the Births and Deaths Registration Act 1957 which was a specific provision applicable to illegitimate children.

[59] It also clearly showed that the plaintiff status was that of non-citizen as the plaintiff biological mother was a non-citizen of Malaysia.

[60] On 25 September 2008, the plaintiff was adopted by one Yu Meng Queng ("YMQ") pursuant to an adoption order and subsequently a new birth certificate was issued with the adopter's name inserted. YMQ then made an application pursuant to art. 15A of the Federal Constitution to obtain citizenship by way of registration but the same was rejected.

[61] YMQ had on behalf of the plaintiff applied to the first defendant for a citizenship status under art. 15A of the Federal Constitution but the application was turned down as YMQ was not able to show a valid record of the registration of the plaintiff's parents' marriage. On 17 November 2011, the plaintiff's father made another application for citizenship under art. 15A of the Federal Constitution and the application was again turned down.

[62] Thus, the plaintiff, *via* originating summons, sought from the court, *inter alia*, a declaration that the plaintiff was a Malaysian citizen under arts. 14(1)(b) and/or 15(2) and 15A of the Federal Constitution. The High Court followed the decision that was reached in *Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia* [2012] 4 CLJ 613; [2012] 5 MLJ 573 and opined that:

> it is crystal clear that at the time of the plaintiff birth the plaintiff mother as stipulated in the birth certificate is an Indonesian citizen and not a Malaysian citizen or permanent resident of Malaysia. Thus, as the reference is made to the plaintiff biological mother, art. 14(1)(b) of the FC will not at all operate for the benefit of the plaintiff.
>
> (see: paragraph 12 [xii] of the grounds of judgment).

[63] Next, and to the extent that counsel made reference to the relevant provisions of the Legitimacy Act 1961 in order to interpret the provisions of the Federal Constitution which are the subject matter of the present discussion, I would refer to the views expressed by the Court of Appeal in *Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor* [2017] 7 CLJ 33; [2017] 3 MLJ 308 CA ("*Pang Wee See*'s case"). In that case, the issue was whether the adoption of a child who was born in Malaysia by his adoptive parents fulfils the requirements of art. 14(1)(b) of the Federal Constitution. In that case, the child was born in a hospital in Malaysia. The identity of his biological parents was unknown.

[64] His adoptive parents were Malaysian citizens and they sought to obtain an order that the adopted child was a Malaysian citizen by "operation of law" under art. 14(1)(b) of the Federal Constitution read together with Adoption Act 1952. The applicant was successful in the High Court but on appeal, the decision of the High Court was set aside.

[65] The following paragraphs in the judgment of the Court of Appeal are illuminating and instructive:

> [27] Reverting back to our instant appeal, learned counsel for the respondent, Mr Raymond Mah, had strenuously argued, in defending the learned High Court judge's decision which was in his client's favour, and sought to convince us that what was required under the art. 14(1)(b) of the Federal Constitution had been fulfilled by the provisions as contained under s. 25A of the Adoption Act 1952, in particular sub-ss. (5) and (6) of the s. 25A.
>
> [28] Article 14(1)(b) of the Federal Constitution states as follows:
>
> Subject to the provisions of Part III of this Constitution, the following persons born on or after Merdeka Day are citizens by operation of law, that is to say: (a) every person born within the Federation of whose parents one at least is at the time of birth either a citizen or permanently resident in the Federation: and ...

[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born. In the case of *jus sanguinis*, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state.

Viewed from the context of these two concepts, we are of the considered opinion that art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) at the time of the person's birth, in order to be a Malaysian citizen by operation of law, under art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution.

[30] Learned counsel Mr Mah had submitted before us that the combined effect of sub-ss. (5) and (6) to s. 25 of the Adoption Act 1952 had enabled the applicant to fulfil all the essential legal requirement needed to be fulfilled by a person seeking citizenship by operation of law, as envisaged under the said art. 14 of the Federal Constitution. Section 9 of the Adoption Act was also referred to and relied upon in support of the proposition that by virtue of the adoption order issued to the child PCC in particular sub-ss. (1) and (2) therein.

[31] What had become clear to us had been that one of the key ingredients stipulated in art. 14(1)(b) read together with s. 1(a) of Part II of the Second Schedule of the Federal Constitution, is that the person seeking to be a citizen of Malaysia *via* this specific constitutional provision must show proof that when he was born in this country, one of his parents must either be a citizen of Malaysia or was permanently resident in this country.

The phrase that is employed under that provision reads, 'is at the time of the birth'. To our minds, that phrase has categorically made a reference to the biological parent of the person, who must either be a Malaysian citizen or a person who is permanently resident in Malaysia. By virtue of this phrase, any person intending to claim citizenship by operation of law under the above stated constitutional provision, it is not sufficient that he or she was born in Malaysia. He must be a person, whose either parent was a Malaysian citizen or a Malaysian permanent resident, when he was born in Malaysia. That provision does not contain any reference to an adoptive parent, *albeit* a Malaysian adoptive parent.

A [35] As regards s. 25A of the Adoption Act 1952, at first blush, sub-ss. (5) and (6) therein, do seem to suggest and thus support the proposition advanced by the Respondent that the adopted child ought to be given automatic citizenship of the adoptive Malaysian parents, by operation of law. The language that was employed in those two subsections would appear to convey an interpretation of
B wide import.

But again, it must be remembered that *these provisions are contained in the Adoption Act 1952, which are specifically drafted to cater for the lawful adoption of children. It does not escape our notice as well, that in the referred to provisions of the Adoption Act 1952, no mention was made to the issue*
C *pertaining to the citizenship status of the adopted child. The effect to be given to those provisions contained in sub-ss. (5) and (61 to s. 25A must be confined to the ambit of its operability. To our minds, they are not intended to extend into the realm of the Federal Constitution in matters pertaining to citizenship*.

[36] To our minds, with respect, **the omission to refer to citizenship**
D **under s. 9 of the Adoption Act 1952 was a deliberate one**. The provisions on citizenship reside under the Federal Constitution and they represent the accepted regime on citizenship and how it is and/ or could be obtained. A reading of the art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution has yielded the following observations. We are of the view that *the phrase 'is at the*
E *time of birth' refers to an actual factual event, referring therefore to the actual biological parent, as opposed to a 'deemed' biological parent created solely for the purpose of catering to the needs of the adopted child within the context of the Adoption Act 1952. We say so because, if the Federal Constitution had intended that an adopted child to a non-Malaysian citizen or a permanent resident of Malaysia, be conferred as a Malaysian citizen upon successful*
F *adoption, such provision would have been expressly stipulated in the Federal Constitution itself. The Adoption Act 1952*, being a subsidiary legislation *qua* the Federal Constitution, cannot be interpreted in such a way as to augment what appears to be a perceived lacuna in the Federal Constitution. **'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'** per
G Raja Azlan Shah FJ (as His Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187.

[37] Although sub-s (6) to s. 25A of the Adoption Act 1952 is couched with the following phrase, 'Notwithstanding anything contained in any other written law ...' such assertion, with respect, does not
H exclude the **omnipresent and omnipotent of the Federal Constitution. No written law can override nor supersede the Federal Constitution**. Article 4(1) of the Federal Constitution expressly declares that any provision in any statute that is inconsistent with the Federal Constitution shall, to the extent of its inconsistency, be void and be of no effect.

I [38] So *the Adoption Act 1952, could not even pretend to confer citizenship to an adopted child upon successful issue of the adoption order from which the current birth certificate of the child was issued by the appellant*.

[39] Put simply, *the Adoption Act 1952 is not competent as a legal instrument to confer citizenship status to an adopted child under art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution. The fact that it is silent on that subject must be telling*. Indeed, it would be futile to insert such a provision in the Adoption Act 1952. If it was the intention of the Federal Constitution to include an adoptive parent as a biological parent (parent whose at least one is at the time of the birth) for the purpose of art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution such intention would have found clear expression in the Federal Constitution itself, because to interpret an adoptive parent in the definition of a biological parent would have huge implications. To reiterate, we could not find such express stipulation in the Federal Constitution and neither could learned SFC nor Mr Raymond Mah, to that effect. In the circumstances, it would indeed be wrong for us to read into the Federal Constitution something which is conspicuously not there. We are therefore in agreement with the learned SFC on this score.

(emphasis added)

[66] It is therefore clear from *Pang Wee See*'s case that the Federal Constitution is to be construed on its own and without regard to the provisions of other statutes, such as the Adoption Act 1952 and by parity of reasoning, the Legitimacy Act 1961 as well.

[67] In the result, the entire legal and constitutional regime and mechanism for the acquisition of citizenship is to be culled from within the four corners of the Federal Constitution which has been described by the Court of Appeal as "omnipresent" and "omnipotent".

[68] Hence, based on the principles of interpretation that was enunciated and lucidly explained by the Court of Appeal in *Pang Wee See*'s case, the legitimisation of P1's status as no longer illegitimate with effect from the date of his parents' marriage on 22 February 2011 is irrelevant insofar as s. 17 Part III of the Second Schedule of the Federal Constitution is concerned.

[69] Thus, for purposes of s. 17 Part III of the Second Schedule of the Federal Constitution, P1's status is the status that obtained at the time of birth, which means that he was illegitimate at that time, and since his mother, Maylene was a non-citizen, he accordingly lacked the requisite qualification for purposes of acquiring citizenship "by operation of law" under art. 14(1)(b) of the Federal Constitution. This disposes off the main issue in this case.

[70] The next point that I will discuss is the order for a declaration of citizenship under art. 15(2) of the Federal Constitution that was sought by P1. Article 15(2) reads as:

> Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.

[71] The learned SFC argues that this relief is premature as the plaintiffs had not even made an application for citizenship under art. 15(2) of the Federal Constitution. In any event, learned SFC maintains that no such application can be made due to the mother of P1 being a non-citizen. Here, reference was yet again made to s. 17 Part III of the Second Schedule of the Federal Constitution which states as follows:

> 17. For the purpose of Part III of this Constitution references to a person's father or to his parent, or to one of this parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.

[72] In *Yu Sheng Meng (Suing Through Next of Kin, Yu Meng Queng) v. Ketua Pengarah Pendaftaran Negara Ors* [2016] 1 CLJ 336; [2015] MLJU 637 HC Asmabi J held that the parent of an illegitimate child whose biological mother is a non-citizen is disqualified from making an application for citizenship under art. 15(2) of the Federal Constitution. I am inclined to agree with the interpretation that was rendered by the High Court in that case.

[73] Thus, it would appear that quite apart from everything else, P1' biological mother's non-citizenship is an impediment to any application for citizenship under art. 15(2) of the Federal Constitution.

[74] But this is not to say that the court would have allowed the application were it otherwise. The opinion of this court on that issue would have to be reserved for another occasion. It just does not arise on this occasion. Before I leave this point, it is worth pointing out that s. 2 of Part III of the Second Schedule to the Federal Constitution provides that "a decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court".

[75] The final point is with regard to the order for P1 to be issued with a certificate of citizenship or sijil kewarganegaraan. This is consequential on P1 succeeding in obtaining a declaration that he is a citizen by operation of law under art. 14(1)(b) or pursuant to art. 15(2) of the Federal Constitution. As P1 has failed on both counts, this prayer does not therefore arise.

[76] For the reasons as discussed above, I am of the view that the OS is unsustainable and is hereby dismissed. The learned SFC pressed for costs of RM5,000. In this regard, I noticed (per the reported cases) that there was a general trend in the High Court and in the Court of Appeal, not to order costs for cases of this nature and if ordered, it is minimal.

[77] For my part, I am not sure of the usefulness or utility of ordering minimal costs. Here, P1 is already severely handicapped as he is with effect from 22 February 2011, the legitimate child of P2 and Maylene, but is unable to attain citizenship because of the relevant provisions of the Federal Constitution.

[78] He is the victim of circumstances which were self-evidently beyond his control. As far as this court is concerned, I will, in the interest of justice and fairness, make no order as to costs.

Order accordingly.